

1 HONORABLE RICHARD A. JONES
2
3
4
5
6
7
8

9
10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE
13
14

15 JAMES M. BLAIR - Pro Se,

16 Plaintiff,

17 v.

18 ALASKAN COPPER AND BRASS CO.,

19 Defendant.

20 Case No.: C07-1877RAJ

21 [PROPOSED] FINDINGS OF FACT
22 AND CONCLUSIONS OF LAW AND
23 DIRECTION FOR ENTRY OF
24 JUDGMENT

25 [Clerk's Action Required]

26
27 This matter came on for bench trial beginning Monday, April 27, 2009. Plaintiff James
Blair appeared *pro se*. Defendant Alaskan Copper & Brass Co. ("Alaskan Copper") was
represented by Brendan Monahan of Stokes Lawrence, P.S. At the close of Mr. Blair's case and
following three days of testimony, Alaskan Copper moved for judgment on partial findings under
Federal Rule of Civil Procedure 52(c). Being fully advised, the Court granted Alaskan Copper's
Rule 56(c) motion. Findings of Fact and Conclusions of Law are as follows:

28 **I. FINDINGS OF FACT**

29 **Background**

30
31 1. Alaskan Copper is a Seattle-based metal materials supply business. The
32 Company fills orders from a warehouse in Renton, Washington. Mr. Blair was hired to work in
33 the Renton warehouse on May 9, 2006. Mr. Blair was terminated by Alaskan Copper on
34 December 18, 2006.

35
36 [PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW AND
37 DIRECTION FOR ENTRY OF JUDGMENT - C07-1877RAJ

38 46363.003 \427157.doc

39
40 **STOKES LAWRENCE, P.S.**
41 800 FIFTH AVENUE, SUITE 4000
42 SEATTLE, WASHINGTON 98104-3179
43 (206) 626-6000

1 2. During the course of his employment, Mr. Blair filed two EEOC Charges. The
 2 first alleged race discrimination and hostile work environment. The second alleged race and age
 3 discrimination, retaliation and hostile work environment. Following his termination, Mr. Blair
 4 filed a third EEOC charge which alleged race and age discrimination, retaliation and hostile
 5 work environment. All three charges were dismissed by the EEOC.

6 3. Following his termination, Mr. Blair filed a labor grievance to contest his
 7 termination. He was represented by his Union in the arbitration hearing.

8 4. Subsequently, Mr. Blair filed this lawsuit. He alleged race and age
 9 discrimination, retaliation, hostile work environment and “whistleblowing.” Alaskan Copper
 10 moved for summary judgment. Dkt # 54. On April 9, 2009, the court dismissed Mr. Blair’s age
 11 and whistleblowing claims and found that remaining claims survived “by the thinnest of
 12 margins” based upon inferences in favor of Mr. Blair that were required by Federal Rule of Civil
 13 Procedure 56. Dkt # 85.

14 5. The Court conducted a bench trial on Mr. Blair’s remaining claims, which were
 15 race discrimination, retaliation and hostile work environment.

16 **Mr. Blair’s Employment, Discipline and Termination**

17 6. When Mr. Blair was hired at Alaskan Copper, he was assigned to work the second
 18 shift in a crew of 11 employees under the supervision of Kevin Lord.

19 7. The first 90 days of employment are considered by management to be an informal
 20 trial period. During this period Mr. Blair was basically a good employee, but he had problems
 21 getting along with other employees.

22 8. Mr. Lord orally cautioned Mr. Blair two times during the probationary period and
 23 recorded the underlying incidents in written reports. On July 13, Mr. Blair and another employee
 24 was cautioned regarding a confrontation. Ex. 200. On July 20, Mr. Lord found Mr. Blair yelling
 25 at another employee and counseled Mr. Blair regarding his behavior. Ex. 201.

26 9. After 90 days, Mr. Blair’s problems with co-workers intensified and Mr. Lord
 27 recorded additional hostile confrontations between Mr. Blair and other employees on August 10

1 and September 1. Exs. 202 and 203. On September 5, Mr. Lord had to move another employee
 2 off of Mr. Blair's station because Mr. Blair was snapping at him. Mr. Lord recorded the
 3 following in connection with that incident. "James is upset that he doesn't get to work with Fred
 4 Davis today and is acting out. James has a hard time working with other employees. James
 5 makes derogatory statements to others and has been warned to stop." Ex. 204.

6 10. Mr. Lord completed a total of five incident reports regarding Mr. Blair before a
 7 first written caution was issued to Mr. Blair. Mr. Lord testified credibly regarding the incidents
 8 underlying each of these reports.

9 11. At trial, Mr. Blair alleged that the Mr. Lord's incident reports were fabricated by
 10 Alaskan Copper following Mr. Blair's termination. Through Mr. Blair's own testimony
 11 however, Alaskan Copper established that the incidents recorded in the incident reports were also
 12 contemporaneously recorded by Mr. Blair in the journal that he kept while employed by Alaskan
 13 Copper. Mr. Blair then testified that he believed the union gave his journal to Alaskan Copper
 14 after he provided it to the union during the grievance process, and Alaskan Copper used the
 15 journal to fabricate the incident reports after his termination. However, Alaskan Copper's
 16 October 20, 2006 letter to the EEOC contained the incident reports as attachments. Ex. 268.
 17 When presented a full copy of Alaskan Copper's October 20, 2006, letter to the EEOC, Mr. Blair
 18 suggested that the Stokes Lawrence law firm fraudulently attached the allegedly fabricated
 19 incident reports to a copy of the letter before producing that document to him in litigation (*i.e.*,
 20 he suggested that the original EEOC letter did not contain the incident reports).

21 12. The facts do not support Mr. Blair's allegations that evidence was fabricated or
 22 tampered with. Through credible testimony of Mr. Lord and through Mr. Blair's own journal
 23 entries, Alaskan Copper established contemporaneous preparation of incident reports that reflect
 24 actual incidents. Ed Cartwright credibly testified about his review of the incident reports prior to
 25 subsequent discipline of Mr. Blair. Exhibit 211 supports Mr. Cartwright's testimony. The court
 26 finds that the incident reports were prepared by Mr. Lord to record problems he was having with
 27 Mr. Blair on the job, used in connection with progressive discipline and provided to the EEOC in

1 response to Mr. Blair's first EEOC charge. The incident reports reflect Mr. Blair's repeated
 2 conflict with other employees and difficulty getting along with others in the workplace. The
 3 incident reports began months before Mr. Blair ever complained about discrimination.

4 13. Mr. Blair complained of discrimination for the first time on September 5, 2006.
 5 He wrote a letter to Alaskan Copper's Human Resources Manager, Robin Murphy, and copied
 6 other members of Alaskan Copper's management. Ex. 1.

7 14. Alaskan Copper investigated Mr. Blair's complaint and found nothing to suggest
 8 discrimination. Ms. Murphy and Operations Manager, James Brown, testified that Mr. Blair had
 9 no specific examples of discrimination. Ms. Murphy and Mr. Brown testified that Mr. Blair
 10 complained that Mr. Lord favored his friends and generally mistreated everyone else. As
 11 described below, Mr. Blair's testimony at trial regarding alleged discrimination supports the
 12 testimony of Ms. Murphy and Mr. Brown regarding the lack of substance contained in
 13 Mr. Blair's complaints.

14 15. After his first complaint to management, Mr. Blair's problems on the job
 15 continued and Mr. Lord continued to document those problems. Mr. Lord recorded complaints
 16 from other employees and his own difficulties managing Mr. Blair. Exs. 205-207. Mr. Lord
 17 testified credibly at trial regarding the incidents underlying his various incident reports and
 18 Mr. Blair's inability to work with any other employees.

19 16. A number of witnesses testified credibly about Mr. Blair's inability to get along
 20 with other employees. This includes Ms. Murphy, Alaskan Copper Superintendent Ed
 21 Cartwright, Mr. Lord and shop steward Anthony Britton. The only person who appears to have
 22 gotten along with Mr. Blair was Fred Davis, a long time Alaskan Copper employee who initially
 23 trained Mr. Blair and was called by Mr. Blair as a witness during trial. Mr. Davis testified about
 24 Mr. Blair's inability to work with others and explained that even he could not communicate with
 25 Mr. Blair as time went on.

26 17. Mr. Blair's own testimony confirmed his inability to get along with others. He
 27 testified about problems he had with a number of other employees, black and white. Mr. Blair

1 testified that his confrontations with other coworkers, including black coworkers, created a
 2 “hostile environment.” Mr. Blair testified that Mr. Lord created a hostile environment for him
 3 when he required Mr. Blair to work with people (black and white) that he did not like.

4 18. Mr. Blair was insubordinate to his supervisor. Mr. Lord, Mr. Britton, Mr. Raplee
 5 and Mr. Davis testified regarding their observations of Mr. Blair’s insubordination. Mr. Blair
 6 admitted insubordination in his own testimony - repeatedly describing his open disrespect for his
 7 supervisor. Mr. Davis testified that plaintiff displayed anger and disrespect for Mr. Lord and that
 8 he believed that this was the primary reason for the treatment that Mr. Blair received.

9 19. On September 25, Mr. Blair wrote a second letter to Alaskan Copper
 10 Management, complaining about discrimination. The letter contained no factual detail. Alaskan
 11 Copper requested factual detail. Mr. Blair cited discrimination in cross-training. He told Mr.
 12 Brown that no black employees were allowed to drive lift trucks. At trial, however, Mr. Blair
 13 testified that he drove lift trucks all the time, as did other black warehouse workers such as Mike
 14 Jenkins.

15 20. On September 26, shift lead Mr. Raplee received a complaint regarding Mr. Blair
 16 from another African American employee, Mark Surratt. Mr. Raplee reported the complaint to
 17 Mr. Lord. Mr. Lord testified that he spoke with Mr. Surratt and then attempted to speak with
 18 Mr. Blair, who “exploded.” He yelled “Fuck the Union, Liars” etc. He screamed and yelled at
 19 Mr. Lord. He said, “You’re going to get yours” and kept calling Mr. Lord a “dog.” Mr. Lord
 20 told Mr. Blair to clock out and go home to keep the situation from escalating. Mr. Blair refused.
 21 Mr. Lord told Mr. Blair that he would call the police if Mr. Blair did not leave. Mr. Blair
 22 punched out and went home 20 minutes early.

23 21. The September 26 incident was witnessed by Mr. Britton, union steward, and by
 24 Fred Davis. Both men testified consistently with Mr. Lord. Mr. Lord called Mr. Davis to the
 25 scene because he knew that Mr. Blair got along with Mr. Davis and believed he might help to
 26 diffuse the situation. Both Mr. Britton and Mr. Lord testified that Mr. Blair was uncontrollable
 27 and Mr. Lord did his best to calm him down.

1 22. Mr. Cartwright participated in the decision to issue a written caution in
 2 connection with the September 26 incident. Before issuing the written caution, he reviewed the
 3 incident reports regarding Mr. Lord's past problems with Mr. Blair. Although Alaskan Copper
 4 could have terminated Mr. Blair for even a single incident of insubordination under its published
 5 discipline policies, it did not. Ex. 263.

6 23. The day after Mr. Blair received the written warning, he filed his first charge with
 7 the EEOC (September 29, 2006). Ex. 9. The charge alleged discrimination on the basis of race
 8 and retaliation for his internal complaints of discrimination. Alaskan Copper investigated the
 9 charge and found no evidence to substantiate Mr. Blair's claims. In fact, employees very clearly
 10 informed Ms. Murphy that Mr. Blair was the problem in the workplace. The September 29
 11 charge was subsequently dismissed.

12 24. On October 6, Mr. Lord had another incident of insubordination with Mr. Blair.
 13 He instructed Mr. Blair to fix a mistake on an order. Mr. Blair resisted. After Mr. Blair finally
 14 corrected the error with only one half hour left in his shift, Mr. Lord directed Mr. Blair to finish
 15 the bundle he was working on before the shift ended. When he saw Mr. Blair leaving at the end
 16 of his regular midnight shift, Mr. Lord told Mr. Blair he was not finished and he would be
 17 disciplined if he did not finish the bundle. Mr. Blair left anyway.

18 25. Mr. Blair was suspended for two days beginning October 9, 2006 for
 19 insubordination and failing to follow his supervisor's instructions. This was progressive
 20 discipline pursuant to Company policy for the incident that had occurred on October 6. The
 21 disciplinary action notice was as follows:

22 At 11:10 P.M., 6 October '06, you refused to listen to your
 23 supervisor giving you instructions. Then you told your supervisor
 24 you would not finish your assigned work. You were insubordinate
 25 and refused to complete your work prior to clocking out.

26 . . . Follow your instructions and conduct yourself in a courteous
 27 manner. *Next probable action termination.*

Ex. 211 (emphasis added).

1 26. On October 9 2006, the day that Mr. Blair's suspension began, he sent a letter to
 2 Mr. Cartwright, complaining again of race discrimination.

3 The body of the letter reads:

4 Would like to meet and talk with you about Kevin Lord.
 5 Supervisor procedures which are one-sided and unfair. For
 6 instance, treating the black employees different than white
 7 employees.

8 Ex. 3.

9 27. Mr. Cartwright testified that he met with Mr. Blair the following day and asked
 10 for examples of discrimination. Mr. Blair repeated his false allegation that black employees are
 11 not allowed to drive lifts. Mr. Blair told Mr. Cartwright that Mr. Lord favors his friends and
 12 gave an example of Mr. Lord letting Mr. Raplee come to work drunk. The only other evidence
 13 of discrimination Mr. Blair provided to Mr. Cartwright was that "all of management is white."
 14 Mr. Cartwright is Asian. Mr. Cartwright testified that he also knew that he had several minority
 15 supervisors.

16 28. Mr. Cartwright testified regarding his investigation of Mr. Blair's claims. Like
 17 Ms. Murphy, he discovered that employees in the warehouse, including African-American
 18 employees, thought Mr. Blair was the problem. Mr. Cartwright concluded that Mr. Blair had
 19 significant issues getting along with other employees in the workplace. He shared the results of
 20 his investigation with Ms. Murphy, and she shared her findings relating to her own prior
 21 investigation of Mr. Blair's first EEOC charge. Like Ms. Murphy, Mr. Cartwright found no
 22 evidence of discrimination. Mr. Cartwright determined that Mr. Raplee was not drinking on the
 23 job or coming to work drunk.

24 29. In the Fall of 2006, Alaskan Copper conducted warehouse promotions. The
 25 Collective Bargaining Agreement ("CBA") establishes multiple "levels" of warehouse
 26 employees, starting at "associate," going to "warehouseman," to "senior," and then to "master"
 27 with increasing hourly premiums at each stage. Promotions were scheduled regularly to

1 maintain company-wide ratios set by the CBA. In the Fall of 2006 Mr. Blair, as an associate
 2 warehouser, was eligible (with all other associate warehousers) for promotion to senior status.

3 30. Mr. Lord testified regarding the promotion selection process, which was as
 4 follows: The warehouse shift supervisors from all shifts at both the Renton and Seattle locations
 5 submitted evaluation sheets on every employee with 21 rating categories and a comments
 6 section. Shift supervisors did not know which level of promotions were available, nor did they
 7 know the number of promotions available – generally, in their location, or on their particular
 8 shift. The superintendent (at the time, Mr. Cartwright) reviewed all evaluation forms and ranked
 9 them in order. Then he met with all of the supervisors to discuss the applicants.

10 31. Only one employee on the second shift at the Renton Warehouse was selected for
 11 promotion, Josh Desmarais. Mr. Desmarais is white and he is younger than Mr. Blair. At the
 12 time, Mr. Lord felt that Mr. Desmarais was his best employee and more qualified for promotion
 13 than anyone else on the shift. Mr. Blair had excellent attendance and good skill scores. He did
 14 not get promoted over Mr. Desmarais because his scores were not as good and because of his
 15 established inability to get along with others in the workplace.

16 32. On December 15, Mr. Blair filed another charge with the EEOC, objecting to
 17 selection of two fellow employees for promotion over him. Ex. 10. He added a claim of age
 18 discrimination in connection with the promotion and complained of continued “harassment,
 19 intimidation and discrimination because of my race and in retaliation for having filed a charge of
 20 discrimination with the EEOC.” *Id.* This second EEOC charge, like the first, was ultimately
 21 dismissed.

22 33. Mr. Blair was terminated for inadequate performance, specifically insubordination
 23 and failing to follow instructions, following an incident on December 15. His behavior on that
 24 evening was consistent with a pattern of conduct that began early in his employment, intensified
 25 and continued throughout.

26 34. The final events began on the night of Friday, December 15. Mr. Blair was
 27 working at a processing station filling orders. The published process, which Mr. Blair had

1 received, requires that all orders be checked for count accuracy by a second employee after the
 2 other employee fills them. This is established and documented procedure in the warehouse. On
 3 the night of December 15, Mr. Blair filled an order that called for four items. He made a mistake
 4 and only packed three items. After incorrectly filling the order and completing the paperwork,
 5 Mr. Blair acted as his own “checker.” Mike Jenkins was the driver who was set to take the order
 6 to Seattle. He noticed that it was incorrectly filled and informed Mr. Raplee. Mr. Raplee was
 7 the shift lead and had responsibility for quality control.

8 35. Mr. Raplee asked Mr. Blair to fix the order and the paperwork. Mr. Blair fixed
 9 the order – adding a fourth piece, but refused to fix the paperwork. He was angry and
 10 aggressive. He said “Just change the three to a four, what’s the big god damn deal?” and turned
 11 his back and walked away from Mr. Raplee. Mr. Raplee had had a good deal of experience with
 12 Mr. Blair, is a member of the bargaining unit and preferred to avoid confrontation. He decided
 13 to, and did, report the matter to Mr. Lord.

14 36. Before the second shift began on Monday, December 18, Mr. Lord contacted
 15 Mr. Cartwright to advise him about what had happened. Mr. Cartwright told Lord to talk to
 16 Mr. Blair about the matter. Mr. Lord did talk with Mr. Blair and reported the result in a written
 17 statement:

18 I went out to James with a copy of sales order #377510 that was
 19 improperly filled to talk to him about his behavior on Friday
 (12/15/06) when the lead warehouser approached him to have him
 20 fix the paperwork and add a piece to the bundle he made short. I
 showed James the copy and asked him why he refused to fix the
 21 paperwork himself; he responded he had no idea what the hell I
 was talking about and denied ever saying anything to the lead at
 22 all. At this point I described the error he made to him and he got
 mad started swinging his arms around and said he never did that
 23 shit and he did use the scale. I then tried to hand James a copy of
 the sales order and he turned his back on me and told me in a
 24 yelling voice I didn’t do that shit, at that point I asked James to
 calm down and stop yelling at me and listen to what I had to say. I
 25 pointed out on the order were [sic] James had not followed
 instructions by one filling and checking the order himself and two
 26 were [sic] he had written the quantity shipped in as 3 not 4. James
 then yelled I told you man I didn’t do that fucking shit, I then told
 James to go to the break room and calm down, he laughed at me
 27 turned around and walked over to the printer and continued to
 work. I followed him and told him he needed to leave the order on

1 the printer and go to the break room like he asked and he said he
 2 would when he was done with the order he was doing. At that
 3 time I let James know that if he refused to do what I asked him he
 4 would have to clock out and go home for not following
 5 instructions. James started to walk back to his station and I asked
 him if he didn't hear me when I told him to put the order down and
 go directly to the break room, he stopped at that point stared at me
 for a moment tossed the order on the printer and stomped into the
 break room mumbling under his breath.

6 Ex. 216.

7 37. Mr. Lord testified credibly regarding the underlying incident and the Court finds
 8 that it was consistent with the contemporaneous written record. Mr. Lord also testified that he
 9 called Mr. Britton, the shop steward, and visited Mr. Blair in the break room. When he was
 10 talking with Mr. Blair, Mr. Blair started cutting him off and raising his voice again and Mr. Lord
 11 told him to go home and see Mr. Lord for his discipline action before clocking into work the next
 12 day. Mr. Britton witnessed the confrontation between Mr. Lord and Mr. Blair and testified
 13 consistently.

14 38. Mr. Lord forwarded his report to Mr. Cartwright with statements signed by
 15 Mr. Raplee and another witness, Mr. Brogan. Exs. 217-219. After consideration by the upper
 16 managers, the final step in the disciplinary progression was agreed upon. Mr. Lord,
 17 Ms. Murphy, Mr. Brown and Mr. Cartwright were involved and testified that they considered
 18 Mr. Blair's work history and discipline record. The following day, December 19, Mr. Lord gave
 19 Mr. Blair was given his termination notice. The notice stated:

20 You failed to follow the instructions of your shift lead and the
 21 order processing instructions. On sales order 377510 you failed to
 22 follow company order processing instructions by signing both the
 23 order 'filler' and 'check by' block which requires a second
 24 warehouseman/order filler. You also recorded the wrong quantity
 25 and weight. When instructed by your lead to fix the problem you
 refused and became very confrontational and insubordinate. You
 were approached by your supervisor for failing to follow the
 instructions of your lead and insubordinate behavior. You
 repeatedly failed to follow your supervisor's instructions and
 became insubordinate and confrontational. This failure to follow
 instructions and disruption of the workplace cannot be tolerated.

26 Ex. 219.

39. Mr. Blair testified that he was set up in furtherance of some kind of a conspiracy initiated by Mr. Lord and/or Mr. Cartwright, aided and abetted by Ms. Murphy, Mr. Raplee and Mr. Jenkins. The Court finds no evidence of any such conspiracy and finds that appropriate disciplinary action was taken in response to Mr. Blair's own conduct. Alaskan Copper's progressive discipline and termination of Mr. Blair was consistent with Company policy, which also would have supported a decision to terminate Mr. Blair for a single instance of insubordination. Ex. 263.

Lack of Evidence of Alleged Discrimination and/or Retaliation

40. Although Mr. Blair claims that he was treated differently because of his race or in retaliation for protected activity, he provided no credible evidence of discriminatory or retaliatory intent. There are no allegations of discriminatory comments or slurs. With respect to any action taken against him, Mr. Blair did not offer evidence that other employees were treated more favorably in similar circumstances. In fact, Mr. Blair testified that “everybody” complained about Mr. Lord and requested assistance from the union to deal with his management style and how he was treating “everybody.” According to Mr. Blair’s own testimony, Mr. Lord only favored two friends, Mr. Raplee and Josh Wallace, because they were his friends. Other white employees did not receive the same treatment.

41. Through the course of the trial, an as an example of Mr. Lord's alleged favoritism toward friends, Mr. Blair repeatedly alleged that Mr. Lord allowed his friend Mr. Raplee to come to work under the influence of alcohol on a regular basis. The court finds that there is absolutely no evidence, other than the limited testimony of Mr. Blair, that Mr. Raplee ever came to work drunk or was under the influence of alcohol. The Court finds that Mr. Blair's testimony on this issue is merely speculation, at best. Notwithstanding that finding, the Raplee allegations are otherwise a non-issue in this case. Mr. Blair did not testify that Mr. Lord allowed Mr. Raplee to come to work drunk because he is white and Alaskan Copper presented evidence that Mr. Lord had, in fact, terminated a white employee for drinking at work. Mr. Blair did not testify that he,

1 or any other African American employees, were *not* allowed come to work drunk and thus
 2 treated in a disparate manner.

3 42. Also throughout the course of the trial, Mr. Blair presented many broad theories
 4 of conspiracy against Alaskan Copper, even expanded to include the law firm of Stokes
 5 Lawrence, P.S. and alleged alteration or fabrication of documents. The conspiracy theories
 6 included allegations that different employees were directed or to engage in activities to harm
 7 Mr. Blair or create a hostile environment for him. The court finds that there is absolutely no
 8 specific evidence to support these theories and finds related allegations unworthy of credence.

9 II. CONCLUSIONS OF LAW

10 1. Following summary judgment, Mr. Blair had three pairs of claims under
 11 analogous state and federal statutes: Race discrimination claims, retaliation claims and hostile
 12 work environment claims. Mr. Blair had the burden of proving each of his claims by a
 13 preponderance of the evidence and he did not. Evidence presented supports judgment in favor of
 14 Alaskan Copper and against Mr. Blair on each of his claims.

15 Disparate Treatment Race Discrimination

16 2. Mr. Blair alleged that Alaskan Copper disciplined, failed to promote and
 17 ultimately terminated him, because of his race. He plead discrimination claims under 42 U.S.C.
 18 § 2000(e) *et. seq.* (“Title VII”) and RCW 49.60.180 (“WLAD”). In either case, Mr. Blair bears
 19 the ultimate burden of proof: to show by a preponderance of the evidence that a challenged
 20 employment decision occurred “because of race.” *Costa v. Desert Palace, Inc.* 299 F.3d 838,
 21 856-57 (9th Cir. 2002)(en banc), *aff’d*, 539 U.S. 90 (2003); and RCW 49.60.180(2); *Mackay v.*
 22 *Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 306, 898 P.2d 284 (1995). Under federal law, a
 23 challenged employment decision is “because of race” if race was a “motivating factor” in the
 24 decision. *Id.* at 856-7. Under Washington state law, the “substantial factor” test applies. See
 25 RCW 49.60.180, *Mackay*, 127 Wn.2d 302 at 307.

26 3. Disparate treatment of similarly situated individuals can be circumstantial
 27 evidence of discriminatory intent. *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 835 (8th Cir.

1 2002); *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654 (9th Cir. 2002). However,
 2 the “similarly situated” analysis is stringent. *See Moran v. Selig*, 447 F.3d 748, 754 (9th Cir.
 3 2006) (quoting *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53-54 (2d Cir. 2001)) (plaintiff in the
 4 protected class must be “similarly situated in all material respects” to the employees who are
 5 allegedly treated more favorably); *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079 (11th Cir. 2004)
 6 (holding that “[t]he comparator must be nearly identical to the plaintiff to prevent courts from
 7 second-guessing a reasonable decision by the employer”) and *Stotts v. Memphis Fire Dept.*,
 8 858 F.2d 289, 299 (6th Cir. 1988) (plaintiff failed to establish employer disparately punished him
 9 for fights because of his race, because plaintiff was not similarly situated with respect to white
 10 employees with less serious discipline records).

11 4. Favoritism is not illegal discrimination. *Pace v. Century Gaming Management, Inc.*, 2009 WL 662086 (Cal.App.2Dist., Mar 16, 2009). In *Pace*, the court affirmed summary
 12 judgment on an employee’s discrimination and retaliation claims, finding that the plaintiff’s
 13 allegations of favoritism did not demonstrate discriminatory intent.

15 We conclude that Pace’s showing does not raise triable issues
 16 regarding whether Rosen’s favoritism constituted proscribed
 17 discrimination. It is undisputed that Miller was Rosen’s personal
 18 friend. As Pace acknowledged in her deposition, she did not know
 19 whether Rosen’s favoritism rested on the friendship, rather than
 20 Miller’s race or age. In addressing FEHA claims, California courts
 21 often look to federal cases interpreting Title VII of the Civil Rights
 22 Act of 1964 (Title VII) (42 U.S.C. § 2000e et seq.), which
 23 resembles FEHA in many respects. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 498) Numerous federal
 24 courts have concluded that Title VII does not proscribe a
 25 supervisor’s favoritism toward an employee based solely on a
 26 friendship or other intimate relationship, even when the favoritism
 27 disadvantages someone within a protected class.

22 *Id.*, *10 citing *Brandt v. Shop ‘N Save Warehouse Foods, Inc.* 108 F.3d 935, 938 (8th Cir. 1997)
 23 (“[I]t is not intentional sex discrimination for [a supervisor] to hire an unemployed old friend
 24 who happens to be male, without considering an applicant who is neither unemployed nor an old
 25 friend and happens to be female.”); *Foster v. Dalton*, 71 F.3d 52, 54, 56 (1st Cir. 1995) (race
 26 discrimination claim failed in light of evidence supervisor altered job description solely to favor
 27

“fishing buddy”); *Holder v. City of Raleigh*, 867 F.2d 823, 826 (4th Cir. 1989) (race discrimination claim failed in light of findings that supervisor engaged only in nepotism in hiring son to fill position).

5. The Court concludes that Mr. Blair has not proven that race was even a partial motivation for any of the adverse employment actions he was subjected to. There is no evidence of racially discriminatory comments or slurs. There is no evidence that similarly situated non-minority employees were treated differently than Mr. Blair on any occasion or generally. The testimony of all the witnesses and the documentary evidence they reviewed show instead that any adverse employment actions were the result of Mr. Blair's work performance, primarily his difficulty getting along with his co-workers and his supervisors.

Retaliation

6. Mr. Blair alleged that Alaskan Copper disciplined, failed to promote, and ultimately terminated him, in retaliation for his discrimination complaints. He plead retaliation claims under 42 U.S.C § 2000(e) (“Title VII”) and RCW 49.60.210(1) (“WLAD”). To prove retaliation, Mr. Blair must establish (1) that he engaged in or was engaging in a statutorily protected activity under federal law, (2) that the Alaskan Copper subjected Mr. Blair to an adverse employment action; and (3) that Mr. Blair was subjected to the adverse employment action because of his engagement in protected activity. *Raad v. Fairbanks North Star Borough Sch. Dist.*, 323 F.3d 1185, 1196-97 (9th Cir.2003); *Allison v. Housing Authority of Seattle*, 118 Wn.2d 79, 96, 821 P.2d 34 (1991) Under federal law, he must prove that his engagement in protected activity was at least a motivating factor for any adverse action. *Stegall v. Citadel Broad. Co.* 350 F.3d 1061, 1067-68 (9th Cir. 2004). Under state law, he must prove that his engagement in protected activity was a substantial factor. *Schonauer v. DCR Entertainment, Inc.*, 79 Wn. App. 808, 827, 905 P.2d 392 (1995), citing *Allison*, 118 Wn.2d at 96, and *Delahunty v. Cahoon*, 66 Wn. App. 829, 832 P.2d 1378 (1992).

7. The evidence is clear that Mr. Blair filed at least three EEOC complaints and the Court finds that filing those complaints is a protected activity. However, based upon the totality of the evidence presented at trial, Mr. Blair did not prove that Alaskan Copper took any action against him, either entirely or in part, because he filed EEOC complaints or made other internal complaints about discrimination. Instead, the court credits the testimony of many witnesses who testified that the reason for the actions they took against Mr. Blair was his unprotected conduct, not his discrimination complaints. Testimony of non-decision makers regarding their observation of Mr. Blair in the workplace only corroborates decision maker testimony. In fact, if anything, the evidence reflects that individuals allegedly taking action were either unaware of the existence of the complaints, or that discipline occurred prior to his complaints. The record reflects fair discipline progressively applied to correct a continued pattern of performance issues that began long before any discrimination complaints were made by Mr. Blair, to the EEOC or otherwise. Protected activity was not a motivating or substantial factor in any adverse employment action.

Hostile Work Environment

8. Mr. Blair claims that he was subject to a hostile work environment based upon his race and/or his protected activity (i.e. discrimination complaints). He plead the same claim under analogous federal and state statutes, 42 U.S.C. § 2000(e), *et seq.*, (“Title VII”) and RCW 49.60.180(3) (“WLAD”).

9. To prevail on his hostile work environment claims, Mr. Blair must establish that (1) he was subjected to verbal or physical conduct because of his race or protected activity; (2) the conduct was unwelcome; (3) the conduct was sufficiently severe or pervasive to alter the conditions of his employment and create a racially abusive work environment. *Fuller v. City of Oakland, California*, 47 F.3d 1522, 1527 (9th Cir. 1995); *Manatt v. Bank of America*, 339 F.3d 792, 798 (9th Cir. 2003) (citing *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002)); *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004) (conduct must be extreme, creating a work environment that is both subjectively and objectively hostile, from the

1 perspective of a reasonable person of the plaintiff's protected class). These elements are the
 2 same under Washington State law. *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-407,
 3 693 P.2d 708 (1985).

4 10. Mr. Blair presented no evidence that he was subjected to any conduct because of
 5 his race or any protected activity. He presented no evidence that he was subjected to conduct
 6 that was subjectively or objectively hostile because of the fact that he is African-American.
 7 Mr. Blair testified that his supervisor made him sign documents and forced him to work with
 8 people with whom he did not want to work. He testified that Mr. Lord was a bad supervisor and
 9 that he had a hostile management style that led to complaints by "everybody." There is no
 10 evidence of any racial comments or slurs, or that any verbal or physical conduct directed from
 11 Mr. Lord to Mr. Blair was motivated by any impermissible factor. To the contrary, Mr. Lord's
 12 actions were job-related and consistently applied to all employees on Mr. Lord's shift.

13 11. The "hostile environment" about which Mr. Blair complains also includes
 14 confrontations with virtually every other employee on his shift, including black employees.
 15 Mr. Blair suggests that these confrontations may have been orchestrated by Mr. Lord as a form
 16 of harassment. Mr. Blair's inability to get along with others was well established at trial. There
 17 is no evidence to connect Mr. Lord to anything that any of Mr. Blair's coworkers may have said
 18 or done to him. Finally, there is no evidence that any co-worker conduct was racially motivated
 19 or motivated by retaliatory animus. Mr. Blair's conflicts resulted from his own attitude and non-
 20 protected behavior and had nothing to do with his race or any other impermissible factor.

III. Judgment

The Court directs the Clerk to enter Judgment pursuant to Federal Rule of Civil Procedure 58.

DATED this _____ day of May, 2009.

The Honorable Richard A. Jones

Presented By:

STOKES LAWRENCE, P.S.

By: /s/ Chris Farias
Chris Farias (WSBA #21743)
Brendan Monahan (WSBA #22315)
Attorneys for Defendant Alaskan Copper
and Brass Co.

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2009, I caused the foregoing *Findings of Fact and Conclusions of Law and Direction for Entry of Judgment* to be:

electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

mailed by first class United States mail, postage prepaid, to the following:

 hand delivered to the following:

James M. Blair
621 S King Street, #522
Seattle, WA 98104

e-mailed and mailed by first class United States mail, postage prepaid, to the following:

faxed and mailed by first class United States mail, postage prepaid, to the following:

/s/ Chris Farias
Chris Farias (WSBA #21743)
Attorney for Defendant
Stokes Lawrence, P.S.
800 Fifth Avenue, Suite 4000
Seattle, WA 98104
(206) 626-6000
Fax: (206) 464-1496
chris.farias@stokeslaw.com